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No. 95-1181

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM C. DUNN & DELTA CONSULTANTS, INC.,
Petitioners,

– v. –

COMMODITY FUTURES TRADING COMMISSION,
Respondent,

– v. –

DELTA OPTIONS, LTD. & NOPKINE CO., LTD.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE FOREIGN EXCHANGE COMMITTEE, THE NEW YORK CLEARING HOUSE ASSOCIATION, THE FUTURES INDUSTRY ASSOCIATION, THE MANAGED FUTURES ASSOCIATION AND THE PUBLIC SECURITIES ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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The Foreign Exchange Committee (the "FX Committee"), The New York Clearing House Association (the "Clearing House"), the Futures Industry Association ("FIA"), the Managed Futures Association ("MFA") and the

Public Securities Association ("PSA") (collectively, the "Industry Associations") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on June 23, 1995, which affirmed the order of the district court for the Southern District of New York appointing a temporary receiver.[1/]

Interests of *Amici Curiae*

The Industry Associations represent many of the most significant participants in foreign exchange forwards and options trading in the United States.

Formed in 1978 under the sponsorship of the Federal Reserve Bank of New York, the FX Committee includes representatives of major domestic and foreign commercial and investment banks and foreign exchange brokers and dealers.[2/] The Clearing House is an unincorporated

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1/ In accordance with Supreme Court Rule 37, the Industry Associations have received written consent of all parties to file this brief. Original copies of these consents have been filed with the Clerk of Court.

2/ The members of the FX Committee are AIG Trading Group, Bank of America, The Bank of Boston, Bank of Montreal, The Bank of New York, The Bank of Tokyo, Ltd., Bankers Trust, The Chase Manhattan Bank, N.A., Chemical Bank, CIBC—Wood Gundy, Citibank, N.A., Deutsche Bank, First Banks N.A., First National Bank of Chicago, Goldman, Sachs & Co., Lasser Marshall, Manufacturers & Traders Bank, Merrill Lynch & Co., Inc., Marine Midland Bank, Morgan Guaranty Trust Company of New York, Morgan Stanley & Co. Incorporated, NationsBanc—CRT, Republic National Bank of New York, Royal Bank of Canada, Swiss

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association of eleven leading commercial banks in the City of New York,[3/] a majority of which are active in foreign exchange trading.

The MFA is a not-for-profit association representing the managed futures industry, including leading United States and international managers, foreign exchange dealers, banks, commodity pool operators ("CPOs"), commodity trading advisors ("CTAs"), futures brokerage firms, exchanges and service providers involved in professional asset management.

The FIA is a national trade association representing the futures industry. Its members include approximately ninety of the largest futures brokerage firms, or FCMs, which effect more than eighty percent of the transactions conducted on United States futures exchanges, as well as users of the futures markets such as commercial and investment banks, CPOs, CTAs, and pension, insurance and mutual fund managers. Its members are also active in over-the-counter ("OTC") foreign exchange trading.

The PSA is the bond market trade association, representing approximately 275 securities firms and banks that underwrite, trade and sell debt securities, both domestically and internationally. PSA's members include all

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Bank Corporation and Tullett & Tokyo Forex International Limited.

3/ The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Bankers Trust Company, Marine Midland Bank, United States Trust Company of New York, NatWest Bank N.A., European American Bank and Republic National Bank of New York.

of the primary dealers in government securities recognized by the Federal Reserve Bank of New York, as well as other government securities dealers. PSA actively represents its members in connection with all aspects of legislative and regulatory matters affecting or potentially affecting the government securities market, including the market for United States Treasury securities, and mortgage-backed and non-mortgage-backed securities issued by United States government agencies and government sponsored enterprises.

Certain members of the Industry Associations have been trading foreign exchange on the OTC foreign currency forwards and options markets with each other and sophisticated counterparties in the United States and around the world for years, with the understanding that their activities were excluded from regulation by the Commodity Futures Trade Commission (the "CFTC") under the Commodity Exchange Act ("CEA").[4/]

[4/] The OTC markets are separate and distinct from commodity exchanges designated by the CFTC for foreign exchange futures and options trading. In the OTC markets, foreign currency transactions are bilateral agreements subject to individual negotiation and customization, in contrast to the contracts that are traded on designated exchanges in which the only variables are the price and timing of the trade.

Options are agreements conveying the right, but not the obligation, to buy or sell a specified amount of currency at a specified exchange rate. Forwards are agreements to exchange two currencies at a specified exchange rate on a future date. By using the term "forward," *amici* do not intend to conclude that the transactions at issue are forwards rather than futures. Because the term "forward" is used in the OTC market and in data sources concerning the market, it is used here rather

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The holding of the Court of Appeals for the Second Circuit—that OTC foreign exchange options are subject to the CEA—could impose tremendous regulatory and transactional costs on the OTC foreign exchange markets, create significant uncertainty over the enforceability of contracts and possibly drive these markets out of the United States, while also disadvantaging market participants in this country in global competition. Indeed, many large-scale participants in foreign currency transactions, which historically have centered their business activities in the United States, could in response shift their foreign exchange trading to their overseas offices to the detriment of the United States markets.

While the appeal below involved a dispute relating to foreign exchange transactions, PSA and its members nonetheless have a vital interest in the disposition of this case because of its potential impact on the government securities markets (because of the Treasury Amendment's exclusion for "transactions in . . . government securities").

Accordingly, it is of vital interest to the members of the Industry Associations that a writ of certiorari issue to review the judgment of the Court of Appeals.

Background

1. The Foreign Exchange Markets

The OTC foreign exchange forward and option markets are highly evolved, sophisticated and very active. Trading is

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than the term "futures." Forwards are excluded from CEA coverage. *See* 7 U.S.C. § 2.

conducted twenty-four hours a day, from 6:00 a.m. Sydney, Australia time on Monday until 5:00 p.m. New York time on Friday, with exchange-rate quotations available worldwide on computer screens and personal telephone pagers. These OTC transactions are not conducted on organized exchanges. Most trading is conducted over the telephone directly with dealers or through brokers. These markets are sensitive to political and financial developments around the world and around the clock.

In addition to commercial and investment banks, the most significant participants in the OTC currency markets are foreign exchange dealers and brokerage companies, corporations, money managers (including pension, mutual fund and commodity pool managers), commodity trading advisors, insurance companies, governments, and central banks. Indeed, governments and businesses have historically relied upon the OTC currency markets to serve a number of their fiscal and commercial needs.

For example, the Federal Reserve Bank of New York (on behalf of the United States and foreign central banks), foreign central banks and foreign governments intervene in the OTC currency markets in an effort to implement their policies with respect to their national currencies.

The importance of foreign exchange to the United States economy is considerable. United States businesses as well as financial institutions depend on active trading in, and the orderly function of, the foreign exchange markets. These OTC markets provide businesses with access to international markets for goods and services by providing the foreign currency necessary for transactions worldwide.

These liquid markets also assist international businesses faced with the vagaries of global interest rate and currency volatility by providing a means of hedging against the risk of an adverse exchange-rate movement. OTC foreign exchange

forward and option contracts are commonly used to hedge inventories or accounts receivable or payable denominated in a particular currency. Such contracts allow participants to shift the risk of adverse exchange-rate movements to a counterparty willing to accept that risk.

The global significance of these markets and the full scope of activity in this country is evident from a triennial survey conducted by the Bank for International Settlements ("BIS") in Basle, Switzerland based on a survey of data submitted by the central banks in twenty-six countries, including the United States Federal Reserve Bank. According to the BIS, in April 1995 the average daily turnover in foreign currency forward transactions in twenty-six countries was approximately $100 billion, representing approximately a 70% increase over the prior three-year period.[5/] Average daily turnover of OTC currency options was $40 billion in April 1995, representing a 29% increase over the prior three-year period.[6/] Approximately one-half ($20 billion) of daily turnover of OTC currency options is attributable to the United States.[7/] In addition, 80% of all options transactions

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5/ BIS, "Central Bank Survey of Foreign Exchange Market Activity in April 1995: Preliminary Global Findings" at 2, Table 1 (Oct. 24, 1995); *cf.* BIS, "Central Bank Survey of Foreign Exchange Market Activity in April 1992" at 19, Table 1-A (March 1993).

6/ BIS, "Central Bank Survey of Derivatives Market Activity: Release of Preliminary Global Totals" at 4 (Dec. 18, 1995).

7/ Federal Reserve Bank of New York, "Central Bank Survey of Derivative Markets Activity Results of the Survey in the United States," at Annex II, Table 5-U.S. (Dec. 18, 1995).

involve United States dollars as one of the exchanged currencies in both the United States and global totals.[8/]

The "great bulk" of options in foreign currency are traded in OTC markets, while exchange-traded foreign currency options constitute a "small part" of the total.[9/] Collectively, the United States, United Kingdom and Japan account for more than half (fifty-six percent) of the global daily turnover in foreign exchange.[10/] The United States and the United Kingdom rank top in the world, with sixteen and thirty percent, respectively, of the global daily turnover in foreign exchange.

2. The Treasury Amendment

In 1974, Congress greatly expanded the scope of commodities covered by the CEA. As a result of the proposed expanded scope of the CEA and its potential impact on existing foreign exchange and other financial markets, and out of a concern that the CEA's "new regulatory limitations and restrictions could have an adverse impact on the usefulness and efficiency of foreign exchange markets for traders and investors," the Treasury Department requested Congress to enact the so-called Treasury Amendment. *See* S. Rep. No. 1131, 93d Cong., 2d Sess. 49-51 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5843, 5888 (herein "*Legislative History*"). The Treasury Amendment, which

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8/ *Id.* at 9.

9/ *See* BIS, "Central Bank Survey of Foreign Exchange Market Activity in April 1992" at 22.

10/ BIS, "Central Bank Survey of Foreign Exchange Market Activity in April 1995: Preliminary Global Findings" at Table 3.

excludes from CEA coverage foreign exchange transactions, provides in pertinent part:

> Nothing in this Act shall be deemed to govern or in any way be applicable to transactions in foreign currency . . . unless such transactions involve the sale thereof for future delivery on a board of trade.

7 U.S.C. § 2(a)(1)(A)(ii).

3. The Conflicting Interpretations of the Treasury Amendment in the Second and Fourth Circuits

Construing the Treasury Amendment in a 1986 decision involving the systematic retail marketing of options to unsophisticated parties, the Second Circuit opined that "[a]n option transaction giving the option holder the right to purchase a foreign currency by a specified date and at a specified price does not become a 'transaction[] in' that currency unless and until the option is exercised." *CFTC* v. *American Board of Trade, Inc.*, 803 F.2d 1242, 1248 (2d Cir. 1986) (citations omitted). The Court then determined that the "Treasury Amendment did not, on its face, appear to exclude defendants' foreign currency options business from regulation," *id.*, and further found that the legislative history of the Treasury Amendment "belie[d] the notion that the exception was designed to exclude from regulation foreign currency options transactions *such as those defendants engaged in with private individuals*," *id.* at 1249 (emphasis added).

The Second Circuit's decision in *American Board of Trade* that the Treasury Amendment does not apply to options appeared to be limited to the facts of the case: the defendants were a self-proclaimed board of trade (the so-called "American Board of Trade") that "provided, *inter alia*, an exchange and marketplace for certain commodity options transactions." *Id.* at 1244, 1248-49. Accordingly, members of the Industry Associations had reason to believe that their

activities, which do not involve the systematic retail marketing of standardized contracts to the public, remained excluded from the CEA and CFTC jurisdiction. Indeed, this belief was affirmed in the Fourth Circuit's later interpretation of the Treasury Amendment.[11/]

In *Salomon Forex, Inc.* v. *Tauber*, the Fourth Circuit held that the plain language and legislative history of the Treasury Amendment excludes from CEA coverage "individually-negotiated foreign currency option and futures transactions between sophisticated, large-scale foreign currency traders." 8 F.3d 966, 978 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1540 (1994) (no CFTC jurisdiction over options trading by a sophisticated individual).

Analyzing the language of the Treasury Amendment, the Fourth Circuit stated:

> The class of transactions covered by the general clause "transactions in foreign currency" must include a larger class than those removed from it by the "unless" clause in order to give the latter clause meaning. Thus, because the clause "unless such transactions involve the sale thereof for future delivery conducted on a board of trade" refers to futures, the general clause "transactions in foreign currency" must also include futures. Under this analysis, we would have to construe the Treasury Amendment exempting transactions in foreign

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11/ The only other Court of Appeals to confront the issue of the meaning of the Treasury Amendment declined to determine "whether the Treasury Amendment affects any CFTC jurisdiction over options on foreign currency." *Board of Trade of the City of Chicago* v. *SEC*, 677 F.2d 1137, 1154 n.34 (7th Cir.), *vacated as moot*, 459 U.S. 1026 (1982).

> currency to reach beyond transactions in the commodity itself and to include *all* transactions in which foreign currency is the subject matter, including futures and options.

Id., 8 F.3d at 975 (emphasis original).

The Fourth Circuit further opined that "it is a short step to conclude that the Treasury Amendment applies to *all* transactions in which foreign currencies are the subject matter, including options." *Id.* at 976 (emphasis original). The Court reasoned that "[s]ince trading in both futures and options involves foreign currency, albeit indirectly, there is no principled reason to distinguish between them in this context." *Id.* The Fourth Circuit also found that application of the Treasury Amendment to options transactions in foreign currency was consistent with its legislative history. *Id.* at 976.

The Fourth Circuit reconciled its holding with *American Board of Trade* by distinguishing the nature of the parties and the circumstances of the transactions involved in the two cases and referring to the Second Circuit's analysis of the "transactions in foreign currency" clause of the Treasury Amendment as "dictum":

> Although the [Second Circuit], in dictum, seemed to indicate that no trading in foreign currency options or futures is excluded from CEA coverage because such trading is not trading "in" foreign currencies, at the same time it noted that such trading *is* excluded when carried out by sophisticated financial institutions. This inconsistency reveals that the key for the Second Circuit in deciding the case was not the subject matter of the deals—but the identity of the parties—unsophisticated private individuals buying on an organized exchange.

Id. at 977-78 (emphasis original).

Notwithstanding the beliefs of the Fourth Circuit (which were consistent with the views of the Industry Associations), the Second Circuit has now eliminated all doubt that the Treasury Amendment does not include off-exchange options transactions in foreign currency, regardless of the identity and sophistication of the parties and the circumstances in which the transactions are conducted. *CFTC* v. *Dunn*, 58 F.3d 50, 53 (2d Cir. 1995) (citing *American Board of Trade* and stating that "[t]his issue is foreclosed by clear precedent in this circuit"). Although the Second Circuit recognized that the panel in *American Board of Trade* could have determined that the transactions at issue were regulated by the CFTC because they occurred on a "board of trade," it professed to be unable to alter in retrospect its prior holding that options are not "transactions in foreign currency." *Id.* ("Appellants and *amici* are correct that we could have altered our reasoning and reached the same result by stating that because the instruments at issue in *American Board of Trade* were traded on an exchange they fell outside the Treasury Amendment. Nevertheless that was not the path we chose.").

The Second Circuit acknowledged the conflict between its decision and that of the Fourth Circuit in *Salomon Forex, Inc.* v. *Tauber*, as well as the "potentially dire effects" of its holding (citing the *amicus* brief submitted by the Industry Associations), but reiterated that it was "bound by precedent." *Id.* at 54. Doubting its prior holding but regarding itself as powerless to alter it, the Second Circuit expressed a need for certiorari review to resolve the conflict between its holding and that of the Fourth Circuit:

> Whatever doubts this panel may have about the interpretation given the Treasury Amendment in *American Board of Trade* . . . are not grounds for our declining to follow it. We acknowledge that our interpretation of the phrase "transactions in foreign currency" in *American Board of Trade* conflicts with that of the Fourth Circuit in *Salomon Forex, Inc.* v. *Tauber* . . . . This conflict is for the Supreme Court, not us to decide.

Id.

REASONS FOR GRANTING THE PETITION

The Second Circuit's holding—that foreign currency options transactions are not within the Treasury Amendment's exclusion and, therefore, fall within the CEA and CFTC jurisdiction—is contrary to the plain language and legislative history of the Treasury Amendment. Such a narrow interpretation of the Treasury Amendment imposes tremendous regulatory and transactional costs on the OTC foreign exchange markets, creates significant uncertainty over the enforceability of the United States' half of the $40 billion dollars in foreign currency options transactions traded daily, and will possibly drive these markets out of the United States while also disadvantaging participants in this country in global competition. For their transactions to be enforceable, parties engaging in OTC foreign currency options transactions in the Second Circuit now must qualify for a regulatory exemption *in lieu* of the broad statutory exclusion from the CEA and CFTC jurisdiction intended by Congress in enacting the Treasury Amendment.

The Second Circuit's decision is thus contrary to the purpose of the Treasury Amendment, which was enacted in response to a concern that the 1974 amendments to the CEA would have "an adverse impact on the usefulness and efficiency of foreign exchange markets for traders and investors." *Legislative History* at 5888.

In addition, the Second Circuit's decision squarely conflicts with that of the Fourth Circuit. Lack of uniformity

in the Circuits on the enforceability of foreign currency option contracts creates the opportunity for enterprising plaintiffs to forum shop in an attempt to invalidate their unprofitable options transactions.

I.

The Second Circuit's holding that options transactions in foreign currency are somehow not "transactions in foreign currency" is contrary to the plain meaning of the Treasury Amendment. As the Fourth Circuit's analysis of the language of the Treasury Amendment demonstrates, the "transactions in foreign currency" clause must include options transactions for the "unless" clause to be reconcilable with the whole provision. *Salomon Forex, Inc.* v. *Tauber*, 8 F.3d at 975.

In contrast, the Second Circuit's holding in *American Board of Trade* is based on the semantic distinction between transactions "in" and transactions "involving" foreign currency, which was not even necessary for the Court to address. *See CFTC* v. *Dunn*, 58 F.3d at 53 ("we could have altered our reasoning and reached the same result by stating that because the instruments at issue in *American Board of Trade* were traded on an exchange they fell outside the Treasury Amendment").

The notion that a foreign currency option is never a transaction "in" foreign currency until the option is exercised elevates form over substance and is inconsistent with commercial practice. An option gives the holder a right to obtain foreign currency. The holder of an option anticipates and intends the exercise of the option (and delivery of the currency) if it is "in the money;" in other words, only if there is value to the holder of the option were it to be

exercised.[12] Whether there will be such value will depend on movements in the price of the currency from the purchase date of the option, an entirely unpredictable event. It thus makes no sense—by differentiating between exercised and unexercised options—to let delivery determine whether a transaction is subject to CFTC jurisdiction. To do so would in effect allow unpredictable market forces to determine the legality of a transaction. From a commercial perspective, foreign currency options are transactions "in" foreign currency because foreign currency is the subject of the transactions. *See Salomon Forex, Inc.* v. *Tauber*, 8 F.3d at 975-76.[13]

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[12] To the same extent, the fact that the purchaser of an option may offset or net a transaction, rather than receive actual delivery of foreign currency, does not change the essential nature of the transaction. Similarly, this analysis and the language of the Treasury Amendment are equally applicable when an option agreement provides for a cash payment, rather than delivery of a currency, based on the value of the currency at the time the option is exercised.

[13] Furthermore, as the Fourth Circuit recognized, "[i]f Congress meant for the clause 'transaction in foreign currency' to apply only to transactions in the commodity itself, it would have no reason to exclude futures transactions conducted on an exchange" from the scope of the Treasury Amendment. *Id.* at 975. Yet futures contracts like options do not involve contemporaneous delivery of the commodity and may not result in delivery. These "transactions involve the purchase of a promise—a contract right—and only indirectly concern the underlying subject matter." *Id.*

II.

The CEA prohibits futures or options trading conducted other than on a board of trade designated and regulated by the CFTC as an exchange ("contract market"), unless such activities fall within a statutory exclusion or regulatory exemption. 7 U.S.C. §§ 2, 6, 6c.

The Industry Associations respectfully submit that the Treasury Amendment was intended to exclude from CEA coverage all OTC foreign currency transactions, including OTC options transactions. By eliminating this statutory exclusion for foreign currency options transactions, the Second Circuit's decision casts a cloud of uncertainty over the enforceability of such transactions.[14/]

While there are two possible regulatory exemptions that could render foreign currency options transactions in the Second Circuit enforceable, one of which the Second Circuit referred to in *CFTC* v. *Dunn*, each of these exemptions is significantly more limited in scope than the Treasury Amendment. Furthermore, exemptions by nature are subject to the CFTC's jurisdiction and regulatory discretion. The specific purpose of the Treasury Amendment was to exclude CFTC regulatory limitations and restrictions on the foreign exchange markets. The more limited and conditional CFTC exemptions simply cannot satisfy this objective. In addition to subjecting affected transactions to CFTC jurisdiction and significant resulting legal uncertainties, the Second Circuit's holding thus also subjects these transactions to CFTC

14/ The most likely party to challenge the legality of an option transaction would be a counterparty for which the transaction proves unprofitable. *See Salomon Forex, Inc.* v. *Tauber*, 8 F.3d at 969-70.

discretion to eliminate or further restrict these exemptions contrary to the intent of Congress.[15/]

The trade option exemption, 17 C.F.R. § 32.4, is limited to options transactions offered to a "producer, processor, commercial user and merchant" handling the underlying commodity, who enters into the transaction "solely for purposes related to its business as such." While the Second Circuit opined that the "dire effects [of its holding] are to a degree deflected by the CFTC's trade option exemption," 58 F.3d at 54, in reality, this exemption offers a limited and uncertain degree of protection, to a narrow group of participants depending upon the circumstances and purpose of the transaction.[16/]

15/ For example, the CFTC has recently considered narrowing the scope of the swaps exemption, discussed below, by among other changes further restricting the category of participants eligible for this exemption. *See* CFTC Proposed Rules, *Section 4(c) Contract Market Transactions; Swap Agreements*, 59 Fed. Reg. 54139, *reprinted in* 2 Comm. Fut. L. Rep. (CCH) ¶ 26,243, at 42,064 (Oct. 28, 1994). The *amici* submit this is precisely the cloud of regulatory uncertainty that Congress sought to avoid by excluding transactions in foreign currency from the CEA and, hence, CFTC jurisdiction.

16/ *See* CFTC Statutory Interpretation, *Trading in Foreign Currencies for Future Delivery*, 50 Fed. Reg. 42983, *reprinted in* [1984-86 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,750, at 31,124 n.13 (Oct. 23, 1985); *CFTC Policy Statement Concerning Swap Transactions*, 54 Fed. Reg. 30694, 30695 n.14, *reprinted in* [1987-90 Transfer Binder] ¶ 24,494, at 36,145 n.14 (July 21, 1989); CFTC Interpretative Letter No. 84-7, *Banking Institutions as*

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The CFTC Exemption of Swap Agreements ("swaps exemption"), 17 C.F.R. § 35, is limited to currency option transactions (1) that are entered into between "eligible swap participants (ESPs);"[17] (ii) that are "not part of a fungible class of agreements that are standardized as to their material economic terms"; (iii) that take into account as a material consideration the creditworthiness of any party having an actual or potential obligation under the swap agreement; and (iv) that are not "entered into and traded on or through a multilateral transaction facility."[18] These criteria restrict and introduce uncertainty as to the availability of the swaps exemption.

III.

The Second Circuit's ruling also creates an anomalous regulatory environment in which OTC options transactions involving a party that is amenable to suit within the Second Circuit— which includes New York City, the preeminent financial and banking center in the world and the location of some of the largest participants in foreign exchange options transactions— are potentially unenforceable unless the party qualifies for a regulatory exemption. The same options transaction, however, would be enforceable in the Fourth

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[16](...continued)
Purchasers of Foreign Currency Options, [1982-84 Transfer Binder] Comm. Fut. L. Rep (CCH) ¶ 22,025, at 28,595 (Feb. 22, 1984).

[17] This term excludes certain entities and all natural persons with less than $10 million in assets and entities formed solely for the specific purpose of constituting an ESP.

[18] 17 C.F.R. § 35.2(a)-(d).

Circuit under *Salomon Forex, Inc.* v. *Tauber*, while its enforceability would be an open question in other jurisdictions.

Lack of uniformity among the circuits would encourage enterprising plaintiffs to seek to invalidate their unprofitable options contracts in the Second Circuit, regardless of their location or the situs of their transactions. In turn, defendants amenable to suit within the Second Circuit would be forced to race to court in any other available jurisdiction to file a preemptive suit against a defaulting customer before the latter could potentially sue in the Second Circuit to invalidate an option contract.

The potential for forum shopping and judicial abuse is reason alone for a writ of certiorari to issue to review the judgment of the Second Circuit in order to resolve the conflict between the Circuits.

CONCLUSION

The members of the Industry Associations and other parties engaging in foreign exchange trading now face considerable uncertainty over the enforceability of their options transactions as a result of the Second Circuit's decision. Such uncertainty as to the enforceability of foreign exchange options transactions could drive the United States' portion of these activities overseas while also disadvantaging market participants in this country in global competition. Accordingly, a writ of certiorari should issue to review the decision of the Second Circuit in order to resolve the conflict between the circuits and to eliminate the "potentially dire effects" of the Second Circuit's decision.

Respectfully submitted,

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